

2722 THEFT BY CONTRACTOR (Wis. Stat. § 779.02(5); § 779.16)¹

Theft by contractor, is committed by one who, under an agreement for the improvement of land, receives money from the owner, and who, without consent of the owner, contrary to his or her authority, intentionally uses any of the money for any purpose other than the payment of claims due or to become due from the defendant for labor or materials used in the improvements before all claims are paid [in full] [proportionally in case of a deficiency].²

To sustain a claim based on theft by contractor, the plaintiff must prove the following elements:

First, (defendant) entered into an oral or written agreement for the improvement of land. (Building) (Repairing) (Altering) (_____) a (house) (garage) (_____) is an improvement of land.

Second, (defendant) received money from the owner under the agreement for the improvement of land. [“Owner” means the owner of any interest in land who, personally or through an agent, enters into a contract for the improvement of the land.³]

Third, (Defendant) [intentionally]⁴ (used) (retained) (concealed) part or all of the money for a purpose other than the payment of claims due or to become due from (defendant) for labor or materials used in the improvements before all claims were paid [in full] [proportionally in case of a deficiency].⁵ [In deciding whether this element has been proved, you may consider whether the claim was subject to a bona fide dispute. A “bona

fide” claim arises from a dispute that is real, actual, genuine, and in fact exists and is not merely pretextual or feigned on the part of the party in an attempt to avoid his or her obligations under the law.]⁶

[You cannot look into a person’s mind to find intent. Intent must be found, if found at all, from the defendant’s acts, words, and statements, if any, and from all the facts and circumstances in this case bearing upon intent.]⁷

Fourth, the use of the money was without the consent of the owner of the land and contrary to (defendant)’s authority.

Fifth, (plaintiff) suffered a monetary loss as a result of (defendant)’s use of the money.

It is your duty to find whether the plaintiff has proven the elements by a preponderance of the credible evidence.⁸

[Burden of Proof: Ordinary, see Wis JI-Civil 200]

[**Note:** In cases where exemplary damages are requested, the trial judge serves as gatekeeper and must determine whether the issue goes to the jury.]

[If you find that questions concerning exemplary damages are appropriate, add the following:

Exemplary damages are an issue in this case. Exemplary damages may be awarded, in addition to compensatory damages, if you find that the defendant committed theft by contractor. The purpose of exemplary damages is to punish a wrongdoer or deter the wrongdoer and others from engaging in similar conduct in the future. Exemplary damages

are not awarded to compensate the plaintiff for any loss he or she has sustained. A plaintiff is not entitled to exemplary damages as a matter of right. Even if you find that the defendant committed theft by contractor, you do not have to award exemplary damages. Exemplary damages may be awarded or withheld at your discretion under these instructions and the evidence in this case. You may not, however, award exemplary damages unless you have awarded compensatory damages.⁹

(Plaintiff) must satisfy you by a preponderance of the credible evidence that exemplary damages should be awarded. If you believe that you should assess exemplary damages against (defendant) by way of punishment and as a warning to others, then you should award such damages as you deem just and proper. Otherwise, you will insert the word “zero” in answer to question eight.^{10]}

VERDICT

Question No. 1: Did (Defendant) enter into an agreement for the improvement of land?

ANSWER: _____

(Yes/No)

Question No. 2: If you answered “yes” to Question 1, then answer this question:

Did (Defendant) receive money from the owner under an agreement for the improvement of land?

ANSWER: _____

(Yes/No)

Question No. 3: If you answered “yes” to Question 2, then answer this question:

Did (Defendant) [intentionally] (use) (retain) (conceal) part or all of the money for a purpose other than the payment of claims due or to become due from (Defendant) for labor or materials used in the improvements before all claims were paid [in full] [proportionally in case of a deficiency]?

ANSWER: _____

(Yes/No)

Question No. 4: If you answered “yes” to Question 3, then answer this question:

Was (Defendant)’s use of the money without the consent of the owner of the land and contrary to the (Defendant)’s authority?

ANSWER: _____

(Yes/No)

Question No. 5: If you answered “yes” to Question 4, then answer this question:

Did (Plaintiff) suffer a monetary loss as a result of (Defendant)’s use of the money?¹¹

ANSWER: _____

(Yes/No)

Question No. 6: If you answered “yes” to Question 5, then answer this question:

What is the amount of the monetary loss suffered by (Plaintiff) as result of (Defendant)’s use of the money?

ANSWER: \$ _____

[IF THE PLAINTIFF REQUESTS EXEMPLARY DAMAGES UNDER §895.446, ADD THE FOLLOWING QUESTIONS:

Question No. 7: If you answered “yes” to Question 4, then answer this question:

Did (Defendant) know that the use of the money was without the consent of the owner of the land and contrary to the (Defendant)’s authority?

ANSWER: _____

(Yes/No)¹²

Question No. 8: If you answered “yes” to Question 7, then answer this question:

What sum of money, if any, do you assess against (Defendant) as exemplary damages for theft by contractor?

\$ _____]

NOTES

1. The jury instruction for a criminal violation of Wis. Stat. § 779.02(5) and § 779.16 is WIS JI-CRIMINAL 1443. Although §779.02(5) applies to private construction projects and § 779.16 applies to public improvement projects, this instruction is applicable to both situations. Where relevant, this instruction follows and is consistent with WIS JI-CRIMINAL 1443. As discussed more fully in Note 6, there may be cases in which a civil recovery is warranted without the criminal intent necessary to support a criminal conviction.

2. § 779.02(5) prohibits a contractor’s use of moneys paid for purposes other than the payment of claims until the claims have been paid in full “or proportionally in cases of a deficiency.” The deficiency situation is discussed in State v. Keyes, 2008 WI 54, 309 Wis.2d 516, 750 N.W.2d 30 at ¶¶20-34. Use the language in the second set of brackets in the case of a deficiency.

3. This definition is based on the definition of “Owner” in Wis. Stat. §779.01(2)(c).

4. A showing of wrongful intent is not required to establish civil liability under §779.02(5). See Burmeister Woodwork Co. v. Friedel, 65 Wis. 2d 293, 302, 222 N.W.2d 647 (1974). However, to qualify for treble damages under Wis. Stat. § 895.80, the elements of both the civil and the criminal statutes,

including the specific criminal intent element required by § 943.20, must be proven to the civil preponderance burden of proof. See Wis. Stat. §779.02(5). See also Tri-Tech Corp. of America v. Americomp Services, Inc., 2002 WI 88, ¶30, 254 Wis. 2d 418, 646 N.W.2d 822.

5. The criminal jury instruction note on this element points out that “The third element was affirmed as a correct statement of the law in State v. Sobkowiak, 173 Wis.2d 327, 336-39, 496 N.W.2d 620 (Ct. App. 1992): ‘The intent establishing the violation is the intent to use moneys subject to a trust for purposes inconsistent with the trust.’ No further intent – to defraud or to permanently deprive – is required.”

6. See Kansas City Star Co. v. DILHR, 60 Wis. 2d 591, 601, 211 N.W.2d 488 (1973).

7. Include the bracketed language if the claim seeks exemplary damages. See footnote 4, supra.

8. Wis. Stat. § 895.446(2) provides the following:

The burden of proof in a civil action under sub. (1) is with the person who suffers damage or loss to prove a violation of s....943.20...by a preponderance of the credible evidence.

9. Compensatory damages must be awarded before punitive damages can be given. Widenshek v. Fale, 17 Wis.2d 337, 340, 117 N.W.2d 275 (1962); Bachand v. Connecticut Gen. Life Ins. Co., 101 Wis.2d 617, 633, 305 N.W.2d 149 (Ct. App. 1981). However, if the compensatory damages are nominal, that is - six cents, punitive damages cannot be awarded. Barnard v. Cohen, 165 Wis. 417, 162 N.W. 480 (1917); Wussow v. Commercial Mechanisms, Inc., 90 Wis.2d 136, 140, 279 N.W.2d 503 (Ct. App. 1979).

10. **Limitation on damages.** Punitive damages received by the plaintiff may not exceed twice the amount of any compensatory damages recovered by the plaintiff or \$200,000, whichever is greater. See Wis. Stat. § 895.043(6).

11. If the plaintiff is proceeding on other causes of action such as breach of contract, the verdict questions on damages will have to be integrated. Because damages for theft by contractor may be eligible for actual costs and exemplary damages under §895.446, it will be necessary to differentiate such damages from damages based on other claims.

12. This verdict question addresses the element of criminal intent, which is not necessary to sustain a simple claim for civil damages under §779.02(5) or 779.16, but is necessary to sustain a claim for exemplary damages and litigation costs under §895.446. The Wisconsin Supreme Court decision in Tri-Tech v. Americomp, 254 Wis.2d 418 (2002) contemplates the possibility of a civil claim based on a violation of Wis. Stat. §779.02(5) which would not qualify for treble damages if the violation was not the result of the requisite criminal intent:

Because Wis. Stat. §943.20 is one of the offenses that qualifies for the treble damages remedy of Wis. Stat. §895.80 [now renumbered to §895.446], we agree with the court of appeals’ conclusion that treble damages are available for theft by contractor under Wis. Stat. § 779.02(5), provided, however, that the elements of both the civil and the criminal statutes are proven, albeit to the civil preponderance burden of proof. Stated differently, the basis of liability for criminal theft by contractor is a violation of the trust fund provisions of Wis. Stat. §779.02(5), plus the criminal intent required by Wis. Stat. § 943.20(1)(b). 254 Wis.2d at 430.

What exactly is it the plaintiff must prove to demonstrate criminal intent? The court in Tri-Tech explained the requirement as follows:

Accordingly, to sustain a cause of action for treble damages under Wis. Stat. § 895.446 for theft by contractor under Wis. Stat. § 943.20, the plaintiff must prove, by a preponderance of the credible evidence, the elements of the criminal offense, including that the defendant knowingly retained, concealed, or used contractor trust funds without the owner's consent, contrary to his authority, and with intent to convert such funds to his own use or the use of another. Id. at 433.

The Criminal Jury Instructions Committee discusses the required level of intent in its footnote 8 to WIS JI-CRIMINAL 1443:

In State v. Hess, 99 Wis.2d 22, 298 N.W.2d 111 (Ct. App. 1980), the court held that theft by contractors requires only “criminal intent” and not “intent to defraud.” Hess seems to indicate the “criminal intent” boils down to knowledge that the defendant is in the position of trustee and that he intentionally uses the money for some other purpose than paying the suppliers. Wis JI-Criminal 1443 is drafted on the premise that using the funds for any purpose other than paying off the lien claimants is theft by contractor. This position is consistent with Hess, and with other recent cases: State v. Blaisell, 85 Wis.2d 172, 270 N.W.2d 69 (1978); State v. Wolter, 85 Wis.2d 353, 270 N.W.2d 230 (Ct. App. 1978).

The 1976 version of Wis JI-Criminal 1443 included a sixth element which emphasized that the defendant must act with intent to convert the funds to his own personal use. This element has been eliminated as possibly confusing in light of the Hess, Blaisell, and Wolter decisions discussed above. The matter is not as clear as one would like, since Hess and Wolter both cite the 1976 version of Wis JI-Criminal 1443 with approval while reaching conclusions that are arguably inconsistent with the instruction's emphasis on “personal use.” The Committee takes the position that using the trust fund money for any purpose other than paying off the lienholders is “personal use” and thus the sixth element in the 1976 instruction was redundant.

This note was cited with apparent approval in State v. Sobkowiak, . . .

In Tri-Tech Corp. v. Americomp Services, 2002 WI 88, 254 Wis.2d 418, 646 N.W.2d 822 – a civil case – the court referred to the “six elements” of theft by contractor without referring to this instruction or to State v. Sobkowiak, . . . The Committee concluded that this reference did not require a change in the conclusion that the offense can be defined with five elements as described above.

As a result of the holding in Tri-Tech, the Civil Jury Instructions Committee believes that the intent described in WIS JI-Criminal 1443 is what is necessary to sustain a civil claim for treble damages. This position was seemingly affirmed in Century Fence Company v. American Sewer Services, Inc., 2021 WI App 75, 399 Wis.2d 742, ¶9, 967 N.W.2d 32. In Century, the court of appeals cited Tri-Tech's conclusion that “...the elements of Wis. Stat. §§ 779.02(6) and 943.20 must be proven” in order to sustain the plaintiff's cause of action for treble damages.

Century also clarified that with regard to element three, absent evidence of a demand and refusal to pay, a defendant's admission to depositing payment into an account encumbered by a security interest “is

insufficient by itself to establish a prima facie case of specific criminal intent.” Century, supra, at ¶11 citing Tri-Tech, 254 Wis. 2d 418, ¶32.

Verdict Question No. 7 mirrors the fifth and final element of Wis JI-Criminal 1443.

COMMENT

This instruction was approved in 2015. This revision was approved by the Committee in October 2022; it clarified the required burden of proof and added to the comment. See also Wis JI-Criminal 1443.